APPENDIX F: RAIL LABOR INTERESTS

Rail Labor Division of the Transportation Trades Department AFL-CIO (ATDD, BLE, BMWE, BRS, HERE, IAM, IBB, IBEW, SEIU, SMW, TCIU, and TWU). The Rail Labor Division of the Transportation Trades Department AFL-CIO (RLD)[124] contends that there are serious problems with the current major consolidation regulations that clearly favor consolidation applicants and effectively devalue the concerns and interests of rail workers, communities, and shippers. RLD further contends that, although the regulations proposed in the NPR purport to address these problems, the proposed regulations must be revised to speak more specifically, more clearly, and more directly in a number of areas. RLD contends, in particular, that because (in its view) the ICC and the STB have often given conflicting signals on the assessment of public transportation benefits and the cramdown issue, and because the carriers have successfully exploited ambiguities and mixed messages in those areas, the new regulations should be, as respects those areas, especially clear and detailed, and mandatory rather than advisory.

General policy, consolidation criteria, downstream effects, and assessment of the public interest. (1) RLD contends that, because experience has shown that the public does not necessarily benefit from major rail consolidations, major consolidation applicants should be required to show, by clear and convincing evidence, that the transaction will produce substantial and demonstrable public interest benefits that are likely to be realized, that cannot be achieved through other means, and that are likely to outweigh any potential harm to the public interest. RLD further contends that this requirement should apply to all major consolidations and not just to those that arguably might reduce railroad competition and competition from other transportation alternatives; the next major consolidations, RLD explains, will be national in scope and will necessarily affect transportation throughout the country and will reduce the industry to 2 or 3 mega-carriers. And, RLD adds, because past applicants have repeatedly offered the same superficial and unsubstantiated claims that transactions would be in the public

[124] RLD's affiliated organizations are the American Train Dispatchers Department-BLE (ATDD), the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employes (BMWE), the Brotherhood of Railroad Signalmen (BRS), the Hotel Employees and Restaurant Employees Union (HERE), the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the International Brotherhood of Electrical Workers (IBEW), the Service Employees International Union (SEIU), the Sheet Metal Workers International Association (SMW), the Transportation•Communications International Union (TCIU), and the Transport Workers Union of America (TWU). BRS, IBB, SMW, and TWU also joined in the Allied Rail Unions (ARU) filing; TCIU, IAM, IBEW, and ATDD also filed a separate joint submission; and BRS also filed separately.

interest, future applicants should be required to produce evidence to support their claims based on prior experience, actual operational studies and pilot programs, customer surveys, or some other objective analysis.

(2) RLD, which notes that the proposed regulations refer to "efficiency" and "greater economic efficiency" as potential public interest benefits of a transaction, contends that we should clarify: that "greater economic efficiency" means greater economic efficiency generally for the nation or regions served by the carriers involved, and not greater economic efficiency for the carriers themselves; that the efficiency must come from the transaction itself, and not from an inference that government license for the transaction is license for the applicants to alter their costs of doing business; and that the potential to use "cramdown" to reduce labor costs should not be a factor in determining whether a transaction is in the public interest. RLD explains: that, while we may consider whether a transaction will promote better transportation for shippers and the public at large, neither shippers nor the public have a legitimate interest in having the government reduce labor costs for the carriers; that, however, the carriers have often distorted and exploited the concept of greater economic efficiency by using ICC/STB approvals of transactions as a justification for abrogating CBAs; that, in particular, the carriers have often asserted that, because changes in rates of pay, rules, and working conditions would make the carriers more efficient, the changes were mandated by the general policy favoring greater economic efficiency; and that, although the courts once held that "public transportation benefits" should not be used as a cover to merely transfer wealth from employees to their employer, the carriers have since succeeded in selling the notion that their economic well-being is part of the concept of greater economic efficiency and is thus a part of the larger public interest.

(3) RLD agrees that we should analyze the likely "downstream effects" of a proposed transaction.

(4) RLD indicates that it applauds our recognition that, because forecasts of public benefits in recent transactions have not turned into real public benefits, it is necessary to look with more skepticism on the claims that applicants make. RLD contends, however, that we have understated the problem in asserting that claimed benefits have been "delayed" by transition problems; it is not at all clear, RLD insists, that the claimed benefits will ever be realized. RLD explains that recent improvements on some carriers have effectively restored them to the level of service provided prior to the initiation of the most recent round of consolidations, while on other carriers the "improvements" have seen service change from terrible, to bad, to below pre-transaction standards.

Paper and steel barriers. RLD contends that many "paper" and "steel" barriers are the result of line sales by Class I railroads that Rail Labor argued (at the time of such sales) were not genuine transactions because the sold lines would not really be independent of the selling Class I, but, rather, would simply feed traffic to the seller and would remain effectively a part of the

seller's system but with fewer employees working at lower pay rates under inferior terms and conditions of employment. RLD further contends that Rail Labor specifically noted (at the time of such sales) that, in many cases, there were financial inducements and penalties to ensure that the supposedly independent new carriers would necessarily feed traffic only to the selling Class I, and that the new carriers' lower operating costs merely reflected their ability to reduce labor costs by cutting employment and pay and by abrogating standard national CBAs. RLD argues that, although (at the time of such sales) the newly created shortlines and regionals denied Rail Labor's charges, many of them, and many of the shippers who supported them, now acknowledge that they are not truly independent of the selling Class I. RLD therefore submits that, in considering mechanisms for the preservation and enhancement of competition, we should tread warily when considering requests for removal of paper and steel barriers; such relief, RLD believes, should not be given when the complained-of barriers were a part of a line sale deal predicated on the supposed independence of the purchaser.

Safe operations. RLD contends that NPR § 1180.1(c)(2) should be revised to recognize "unsafe operation of rail service" as a "potential result from consolidations which would ill serve the public." The ability of the carrier to operate safely, RLD insists, is not just an issue at the time of integration; it is, rather, a concern in each day of operation. Applicants, RLD argues, should therefore be required: to show that they will have the financial ability to ensure continued safe operations after the transaction is consummated; to produce a "safety inventory" analyzing the condition of tracks, structures, dispatching and signal systems, and locomotives and rolling stock; and to explain plans to maintain and/or upgrade those physical assets.

Cramdown. (1) RLD claims that, although it appreciates our identification of the carriers' use of "cramdown" as a potent source of friction in labor-management relations, NPR § 1180.1(e) will do nothing to reduce labor-management conflict over cramdown because (RLD insists) NPR § 1180.1(e) effects no real change in the status quo. RLD explains: that the status quo permits a carrier to obtain "cramdown" relief by demonstrating to an arbitrator that the change or abrogation of a contract is somehow merger-related and will foster some change in operations that will provide a virtually unquantifiable public transportation benefit; that, oftentimes, the asserted public benefit is merely a reduction in labor costs for the carrier that supposedly will somehow be passed along to the public; that arbitrators have understood our decision in Carmen III to mean that the carrier can justify work assignment and employment level changes merely by showing that it could operate more efficiently with the changes than without them; and that we have never found that an arbitrator went too far in saying that a CBA could be modified or abrogated. The carriers, RLD contends, look at the present environment as giving them license to do whatever they want, and they therefore have little incentive to make substantive concessions.

(2) RLD objects to our NPR § 1180.1(e) statement that we are required to provide "adequate" protection to the rail employees of applicants who are affected by a consolidation; the

fact of the matter, RLD argues, is that we are required by 49 U.S.C. 11326(a) to provide a "fair arrangement" that is protective of the employees; and RLD insists that we should use the term "fair arrangement" in NPR § 1180.1(e). RLD explains: that, because we cannot by rulemaking amend our governing statute, we cannot adopt a rule that will result in protective conditions that do not provide a "fair arrangement" for employees; and that the use of an alternative word such as "adequate" could lead to confusion among labor and management as to whether we have articulated a new standard as to what constitutes a "fair arrangement."

(3) RLD notes that, although it agrees with our general approach favoring private settlement of management-labor disputes, NPR, slip op. at 17, it views this general approach in a somewhat different manner. The parties, RLD explains, already have a private settlement, the Washington Job Protection Agreement of 1936 (WJPA), that was used successfully from 1936 to 1980 and that, if used now, would once again provide the appropriate means for the selection of forces and the assignment of employees involved in merger-related transactions.

(4) RLD notes that the third sentence of NPR § 1180.1(e) provides that "[t]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." RLD insists that this sentence is well within our statutory power, and suggests, in essence, that we should expand on this sentence by narrowing the now prevailing "necessity" and "approved transaction" standards. (a) *Necessity standard.* RLD contends: that the Carmen III necessity standard, which (RLD claims) permits application of the 49 U.S.C. 11321(a) cramdown provision to abrogate or modify CBAs when that action will provide a "public transportation benefit," is a departure from earlier ICC and judicial interpretations; that the Carmen III necessity standard is not nearly as stringent as is required by 49 U.S.C. 11321(a); that we have the authority to restate the necessity standard to one more stringent than exists today; and that we should use this authority to adopt a more stringent necessity standard that would not allow wholesale changes in CBAs greater in scope and far removed in time from the actual financial transaction for which approval has been sought and granted under 49 U.S.C. 11323-24.[125] (b) *"Approved transaction" standard.* RLD, which

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[125] RLD, which insists that we have applied a more exacting "necessity" standard before "cramming down" changes in contracts other than CBAs, contends that our maintenance of 2 "necessity" standards for 49 U.S.C. 11321(a) is arbitrary and capricious and may raise Fifth Amendment issues because (RLD explains) we are applying a different "necessity" standard based upon the property right at issue. RLD further contends that any claim that CBAs are different because of the provision for compensatory benefits under 49 U.S.C. 11326 would be wrong; the benefits under 49 U.S.C. 11326, RLD explains, are provided to cushion the economic effects of a merger on railroad employees; and such benefits, RLD insists, are not a quid pro quo

(continued...)

contends that the term "approved transaction" should also be construed narrowly, would apparently limit that term to the actual financial transaction for which approval has been sought and granted under 49 U.S.C. 11323-24. Cramdown, RLD contends, should only be applicable if, without cramdown, the "approved transaction" would be blocked. (c) *The WJPA standard.* RLD contends that we should adopt a "cramdown is dead" policy by determining that, under 49 U.S.C. 11321(a), any override of CBAs beyond those permitted under the WJPA procedures is not "necessary" to carry out the "approved transaction." RLD further contends that, because the WJPA is a negotiated agreement that permits the carrying out of approved transactions, reliance upon the WJPA procedures for the carrying out of such transactions (i.e., for the selection of forces and assignment of employees necessary to carry out such transactions) would make it "unnecessary" to use cramdown to abrogate or modify any CBA involved in a merger.

Transfers/relocations. RLD contends that the New York Dock conditions must be modified to reflect the transcontinental nature of any future consolidations, and the inherent hardships worked upon employees forced to relocate or transfer as a result. RLD, which insists that the transcontinental nature of present-day rail consolidations renders the existing protective terms inadequate and their historical justification less than convincing, argues that, to truly constitute "fair arrangements" for the protection of employees, the New York Dock conditions must be modified as proposed by RLD in its ANPR comments.

Test period averages. RLD contends: that the TPA provides the means for the employee to help determine whether there has been an adverse effect and to quantify the severity of the adverse effect for a given month; that the TPA also enables the employee to fulfill the obligation to work the highest-rated position available to the employee in the normal exercise of his/her seniority; and that neither the calculation of the TPA, nor the furnishing of the TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred. RLD further contends that the carriers have resisted providing TPAs in the hope of frustrating employees in their efforts to obtain benefits to which they are entitled (the carriers, RLD explains, say that employees cannot obtain benefits without showing adverse effect, but have refused to provide the employees with readily available data necessary to show loss of earnings until they are found to be adversely affected). RLD, which insists that there are substantial equitable reasons why carriers should be required to provide TPAs[126] and that there are no good

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[125](...continued)
for the use of the cramdown.

[126] RLD explains that, without carrier-provided TPAs, an employee must attempt to show loss of earnings based on pay stubs for the preceding 12 months. And, RLD adds, because the loss of earnings is for the test period "time paid for", the employee must calculate, for the
(continued...)

reasons for the carriers to refuse to provide them,[127] contends that, to ensure that employees who have been adversely affected by a consolidation receive the benefits to which they are entitled, we should require railroads to provide each employee with his/her TPA, upon the employee's request.

Cross-border issues. RLD contends: that it is possible that foreign applicants might seek, as part of a merger, to transfer parts of their domestic operations (e.g., their train dispatching operations) to locations beyond U.S. borders; that, therefore, foreign applicants should be required to provide assurances of continued FRA supervision of operations that would impact the safety of the domestic rail system; that such a requirement is unnecessary in the case of domestic carriers because, by definition, their operations are fully within U.S. borders and fully subject to FRA supervision; and that, although such differentiation between foreign applicants and domestic applicants may be discrimination, it certainly is not unlawful or improper discrimination. RLD further contends that, in any event, we could satisfy the discrimination concerns expressed by CN and CP by expanding NPR §§ 1180.1(k) and 1180.11 to encompass domestic carriers that, as part of a wholly domestic merger, intend to transfer to another country any part of their operations that would impact safety of domestic operations. And, RLD insists, we should also expand NPR § 1180.1(k) by requiring applicants (foreign as well as domestic, apparently) to "provide assurance that operational control of rail trackage within the United States shall remain within the United States subject to regulation by the government of the United States." RLD, which argues that the U.S. does not permit foreign nationals to control U.S. commercial airspace, insists that the rail system should be accorded the same protection.

Passenger rail issues. RLD contends that we should treat existing passenger rail service as essential to the communities that have such service. RLD further contends that, because passenger rail operations often share track, facilities, and equipment with freight railroads, we should provide that, if passenger rail workers are adversely affected by a consolidation, they should be eligible for employee protections similar to those provided freight rail workers in the same transaction.

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[126](...continued)
preceding 12 months, not only average earnings but also average hours worked.

[127] RLD insists that it would be a relatively simply administrative function for the carriers to calculate TPAs.

Allied Rail Unions (BRS, IBB, NCFO, SMW, and TWU). ARU,[128] which indicates that the 5 ARU unions join in and adopt as their own the comments filed by RLD, contends that we should end cramdown because (ARU insists) cramdown can no longer be said to be necessary to the carrying out of any major consolidation.

(1) ARU argues that the NPR does not adequately address the problem of carrier use of Board approvals of transactions to override existing CBAs. ARU insists that, although NPR § 1180.1(e) states that "[t]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction," this language lacks standards and contains no specific rules that would result in a change in the status quo.

(2) ARU argues that ICC and STB decisions, and arbitration awards that have been sanctioned by the Board, have allowed the use of cramdown as a means of compelling CBA changes, sometimes many years after the primary approved financial transaction had been consummated. ARU claims that the ICC/STB and arbitrators have accepted carrier arguments that they were carrying out transactions and could override CBAs not only when they combined adjoining seniority districts of previously separate carriers, but also when they merged multiple and non-contiguous seniority districts in several states that were previously separate districts within the same pre-merger carrier. ARU insists that: it is one thing for carriers to claim a necessity to change existing CBAs when they are combining work forces at common points or common territories where there will be ongoing mixed assignments with employees who previously worked under different CBAs regularly assigned to the same locations or territories; but that it is an entirely different matter for the carriers to claim that CBAs must be changed in order to create vast seniority districts or work territories or regions under a single CBA where the real change is not in the combination of previously separate workforces with consolidated assignments of work, but rather in the CBA that will govern the employees involved.

(3) ARU argues that, because the carriers have found it undesirable to maintain separate CBAs at separate stand-alone facilities, in separate seniority districts and even in their own separate work regions that do not interact with each other, they have used cramdown to just eliminate CBAs, even when there has been no operational reason to do so. These changes, ARU explains, have been accomplished with the approval of the ICC/STB and its arbitrators because they were supposedly "necessary" to the "carrying out" of the approved transactions (even ones

[128] The Brotherhood of Railroad Signalmen (BRS), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the National Council of Firemen and Oilers/SEIU (NCFO), the Sheet Metal Workers International Association (SMW), and the Transport Workers Union of America (TWU) filed jointly as the Allied Rail Unions (ARU).

consummated many years earlier). ARU contends that, under current precedent: the "necessity" standard has been transmuted first into "convenience" and then into "desirability"; the "carrying out of the transaction" standard has been transmuted from effecting the approved financial transaction, to implementation of the consolidation made possible by common ownership, to realization of efficiencies and economies of the type contemplated by the applicants; and the "transaction" concept has been transmuted from the approved merger or acquisition of control, to the alleged goals of the transaction. Recent precedent, ARU argues, has sanctioned cramdown whenever it would be advantageous for facilitation of any plan that might be related to the applicants' objectives in consolidating, including simple reductions in their labor costs.

(4) ARU argues that the NPR's statement that we will look with "extreme disfavor" on cramdown "except to the very limited extent necessary to carry out an approved transaction" offers cold comfort to Rail Labor because of the misuse of the word "necessary" and the words "carry out" under prior ICC and STB decisions. ARU insists that, if we truly intend a change in this area, our use of this language is likely to frustrate our purpose.

(5) ARU argues that the reality of the nature of future major consolidations is such that the current regime can no longer be justified as a matter of policy; there can simply be, ARU explains, no necessity for CBA overrides in connection with future Class I consolidations that will be transcontinental in scope. ARU adds: that the fact that 2 railroads will meet in Chicago or Kansas City cannot possibly necessitate overriding the CBAs covering tens of thousands of employees on the east and west coasts; that integration of operations at a connecting point could not possibly require having seniority districts stretching from Pennsylvania to Colorado, combining seniority districts in New England under a CBA applicable in Texas, or placing shops in Kentucky under agreements applicable to shops in California when there will be no interchange of work or employees between the facilities; and that, while there never was merit to the ICC/STB's purported rationale for CBA overrides, that rationale is facially specious with respect to the transactions that will be covered by the new regulations.

TCIU, IAM, IBEW, and ATDD. TCIU, IAM, IBEW, and ATDD, which have joined in the comments filed by RLD, have also offered supplemental comments of their own. TCIU, IAM, IBEW, and ATDD indicate that, although they are disappointed that the NPR proposes neither to end cramdown entirely nor to adopt the TCIU/IAM/IBEW/ATDD alternative cramdown proposal,[129] they take seriously the Board's encouragement of the parties to attempt to resolve the cramdown issue through private agreements and the Board's specific urging that the parties negotiate resolution of contentious issues such as mandatory employee relocation. TCIU,

[129] See NPR, slip op. at 185-86.

IAM, IBEW, and ATDD indicate that they will attempt to negotiate a broad-based agreement on these issues and will report back to the Board on their progress.

Amalgamated Transit Union. The Amalgamated Transit Union (ATU) has taken issue with the NPR's treatment of passenger rail issues.

(1) ATU contends that, because much of the nation's public transportation industry uses the track or right-of-way of various freight railroads, future mergers have the potential to negatively impact commuter rail operations (ATU notes, in particular, that past mergers have resulted in more distant centralized dispatch centers and the replacement of freight railroad personnel who had been trained to provide commuter services on behalf of commuter authorities through "purchase of service" agreements). ATU therefore insists that we must consider the impacts of mergers on existing and future rail passenger services as a key factor in our decision on the merger itself. And, ATU adds, any potential adverse impacts to rail passenger operations (especially those concerning safety and reliability) should be weighed, as a public policy issue, in the decision as to whether or not to approve any merger.

(2) ATU contends that, as respects commuter rail operations, the "essential service" concept should go beyond the consideration of whether alternative transportation is available, and should consider, rather, the significant long-term planning and financial commitments that local communities across the U.S. have made to include passenger rail service as part of the solution to their mobility challenges. ATU further contends that the standards of sufficient public need and whether or not alternative transportation is available fail to take into consideration the issues of congestion, environmental concerns, and whether or not such alternative transportation is affordable. ATU claims that, once local communities have made the significant commitments required to establish passenger rail service, the existing passenger rail service indeed becomes essential to the economic vitality of the public by serving critical mobility needs and by creating jobs in the community as well as within the commuter rail authorities themselves. ATU therefore insists that our regulations should provide that all existing passenger rail service shall be considered essential in communities that have wisely invested their resources in necessary public transportation infrastructure.

(3) ATU contends that, as the proposed regulations would require the Board to provide adequate protection to freight rail employees affected by a consolidation, they should require similar guarantees for passenger and commuter rail employees who may be affected by a consolidation. ATU further contends that potential adverse impacts on safety should also be addressed prior to any final decision. And, ATU adds, we should maintain a strong oversight role to protect the interests of commuter rail passengers and personnel.

Brotherhood of Railroad Signalmen. The Brotherhood of Railroad Signalmen (BRS) contends that we should revise our merger regulations in light of the current transportation

environment and the prospect of a North American transportation system composed of as few as 2 transcontinental railroads.

(1) BRS, which opposes the use of preemption procedures to force labor concessions in approved transactions, argues that preemption of collectively bargained rights was intended only to allow non-labor-related transportation benefits to be realized for the public good and not to allow the forced imposition of work rule concessions on employees only minimally affected by a merger. CBA changes, BRS insists, should be made only through bargaining. And, BRS adds, the wholesale imposition of railroad-preferred work rules exceeds what is intended in the Interstate Commerce Act.

(2) BRS notes that NPR § 1180.1(e) provides that "[t]he Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." BRS concedes that this statement appears to address some employee concerns but insists that there is nevertheless a problem with this statement. The problem, BRS explains, is that similar language has been used by the Board in the past without accomplishing the intended result. BRS insists, in particular, that, although similar language was used in Carmen III, a subsequent arbitration involving shop-craft employees resulted in the replacement of entire CBAs with other CBAs even though there was neither any integration of employees nor any other considerations making CBA changes even remotely necessary.

(3) BRS contends that the now-suspended "cramdown" negotiations between employee representatives and the NCCC should be resumed. BRS further contends that these negotiations, if successful, would serve the interests of rail employees and rail carriers alike (BRS explains that successful resolution would serve the interests of rail employees by placing limitations on the use of preemption, and would serve the interests of the rail carriers by providing a workforce subject to less disruption and therefore better capable of dealing with the challenges presented by the merger of large rail carriers with dissimilar work rules). And, BRS adds, to give rail employees the leverage they lack under the current process we should: (a) grant the parties a specified period of time in which to resolve this issue jointly, and indicate that, if there is no joint resolution, we will issue a final rule in this specific area; and (b) indicate to the industry that we are considering a final rule that could prohibit any arbitrator acting under the authority of the STB from overriding, modifying, or abrogating a CBA.

United Transportation Union. (1) United Transportation Union (UTU), which contends that the abrogation of collective bargaining rights by carriers under the guise of merger procedures has been a serious problem for UTU and its members over the past 2 decades, indicates that the recently negotiated solution to this problem (the UTU/NRLC agreement, which UTU refers to as the "Revised Standards") addresses "cramdown" issues to UTU's satisfaction. UTU advises: that the parties reached their agreement to the Revised Standards by bargaining

under the Railway Labor Act; that the parties intend that the Revised Standards will be prescribed by statute and will not be conditions imposed and administered by the STB; and that the parties have agreed that the UTU/NRLC agreement is not itself subject to the 49 U.S.C. 11321(a) exemption provision. UTU further advises that, because the UTU/NRLC agreement removes the labor relations issue of post-merger CBA changes from the STB's control, the STB has been freed to administer transportation issues and to get out of the labor relations business. And, UTU adds, it remains steadfast in its belief that negotiations provide the best method for resolving "cramdown" issues.

(2) UTU contends that, although the UTU/NRLC agreement addresses "cramdown" issues, the positions of Rail Labor on other labor issues in major rail consolidations should be given more consideration than they have been accorded in the regulations proposed in the NPR. UTU contends, in particular, that Rail Labor should be mentioned in NPR § 1180.1(a), (c), and (h). UTU further contends that Rail Labor is a necessary voice on the NPR § 1180.1(h) Service Council.

John D. Fitzgerald. Mr. Fitzgerald, General Chairman for UTU on lines of BNSF, filed for and on behalf of UTU—General Committee of Adjustment (UTU/GO-386). Mr. Fitzgerald's primary concern is with the "Northern Lines" formerly operated by the Great Northern Railway Company, the Spokane, Portland & Seattle Railway Company, and the Northern Pacific Railway Company.

Scope of the proposed regulations. Mr. Fitzgerald contends that the NPR does not correctly set forth the scope of the proposed regulations with respect to the transactions and carriers involved and the extent to which the "regulations" may be considered binding.

(1) *Title of the NPR.* Mr. Fitzgerald contends that, although the NPR is titled "Major Rail Consolidation Procedures" and purports to involve only "major" transactions (i.e., transactions involving the control or merger of at least 2 Class I rail carriers), the fact of the matter is that the regulations proposed in the NPR go far beyond "major" consolidation proposals; the NPR, Mr. Fitzgerald explains, extensively revises present regulations applicable to "significant" and "minor" transactions as well as "major" transactions. Mr. Fitzgerald insists that, because the NPR fails to adequately announce important changes for other than major rail consolidations, the NPR has not provided the public and railroad employees due process.

(2) *Policy statement or regulation.* Mr. Fitzgerald notes that the NPR: proposes modifications to our "regulations," NPR, slip op. at 1; proposes new "rules," NPR, slip op. at 1; and indicates that "[t]he centerpiece of our proposed rules is a new merger policy statement," NPR, slip op. at 9. Mr. Fitzgerald contends that the NPR appears to have confused a *rule* or *regulation*, on the one hand, with a *policy statement*, on the other hand. Mr. Fitzgerald explains that a policy statement is not binding (i.e., it can be challenged when applied), and is subject to

very limited judicial review. Mr. Fitzgerald insists that any final rules should indicate that the NPR § 1180.1 "general policy statement" is not binding.

The secrecy process. Mr. Fitzgerald contends that the proposed policy statement and regulations do not solve the "secrecy process" that (Mr. Fitzgerald claims) is the heart of the STB's problem. Mr. Fitzgerald, who maintains that the service disruptions that followed recent rail consolidations did not follow older rail consolidations, insists that what has changed over the years has been the nature of the process for inquiring into the merits of a major rail consolidation proposal. Mr. Fitzgerald contends that a closed and secret process for the development of evidence, and its evaluation by the select few, has been substituted for the formerly open procedures that encouraged full participation by the public and examination of the record by many persons. An open and complete record, Mr. Fitzgerald adds, tends to unearth problems, which then may be evaluated and addressed in a timely fashion.

(1) *Prefiling procedures.* Mr. Fitzgerald claims that the NPR would continue, and enlarge, the prefiling process whereby carriers and STB staff determine, behind closed doors, the initial evidentiary framework and requirements for the forthcoming application. The real merger decisional process, Mr. Fitzgerald argues, takes place between attorneys for applicants and agency staff. And, Mr. Fitzgerald adds, although there are rules against ex parte communications, these rules come into play only after an application has been accepted and noticed for the taking of evidence. Mr. Fitzgerald also claims that, although STB staff is permitted to be involved in ex parte communications even after the application has been accepted so long as a memorandum is placed in the public docket, there is no requirement that parties to a proceeding be notified that an item has been placed in the public docket, and, in actual practice, agency staff does not provide such notification.

(2) *Hearings.* Mr. Fitzgerald contends: that we did not conduct public hearings in our most recent consolidation proceedings; that the only "hearings" held in our most recent consolidation proceedings were conducted by an ALJ from another agency, were restricted to discovery issues, and were held in Washington, DC; and that most of these "hearings" were closed to the public. Mr. Fitzgerald further contends that, in years gone by, major rail consolidation proposals were the subject of local hearings (to allow input from the public and examination of carrier statements) and the ALJ assisted in the process of developing an adequate record (even if the record ultimately was certified to the agency without an ALJ's initial decision). Mr. Fitzgerald insists that, under the procedures formerly employed, potential problems were discovered and analyzed; and, Mr. Fitzgerald adds, railroad employees frequently appeared at local hearings and contributed to the evidentiary process, particularly with respect to operating matters.

(3) *Secret procedures.* Mr. Fitzgerald contends that, whereas current practice at the STB allows much of the critical evidence adduced after the application is accepted to be placed under

seal, this was very rare in railroad consolidation proceedings until recently. Mr. Fitzgerald further contends that, because the secret critical materials, and thus an important part of the proceedings, have a limited audience, the scope of analysis by the public and by all parties is circumscribed.

(4) *Ex parte contacts.* Mr. Fitzgerald claims that it is common knowledge that persons in the transportation industry (including railroad executives, heads of trade organizations, and employee representatives) frequently have private audiences with STB members; and, Mr. Fitzgerald adds, the secrecy process of the STB is not confined to railroad consolidation proceedings, but permeates the agency. Mr. Fitzgerald argues that closed private gatherings should not serve as a substitute for the development of a public record, and for the interaction of views within the transportation industry through an open process. The STB, Mr. Fitzgerald insists, should disavow secrecy, except in a dire emergency.

(5) *Diskette requirements.* Mr. Fitzgerald contends that the requirement that all submissions be accompanied by a diskette compatible with WordPerfect 9.0 precludes participation by large numbers of the public. Mr. Fitzgerald further contends that this "unconscionable" diskette requirement, which (Mr. Fitzgerald notes) is in addition to the availability of all filings by the scanning process, is part of the limited information and secrecy process that (Mr. Fitzgerald insists) will lead to further service disruptions and service inadequacies.

Excess capacity and enhanced competition. Mr. Fitzgerald rejects the notion that, because railroads have now reduced most or all of their "excess capacity" and have greatly improved the efficiency of their operations, future merger applicants should be required to "enhance competition" as an offset to negative impacts from service disruptions and competitive harms.

(1) *Excess capacity.* Mr. Fitzgerald contends: that the NPR's "excess capacity" contention is a fabrication; that a mission to reduce "excess capacity" through Class I rail mergers does not exist for the ICC/STB; and that, in any event, the "excess capacity" concept has not been applied by the ICC/STB in the administration of the present policy statement. Mr. Fitzgerald further contends: that the national policy toward railroads is not pro-merger; that, rather, the national policy is toward a limited number of systems; that the present policy statement is not pro-merger and was not designed to have the agency eliminate or reduce excess rail capacity; and that ICC/STB decisions over the last 20 years have not authorized consolidations of Class I carriers based upon any asserted need to reduce capacity. And, Mr. Fitzgerald adds, the existence of "duplicative facilities" does not equate with "excess capacity."

(2) *Enhanced competition.* Mr. Fitzgerald contends that our justification for an "enhanced competition" standard does not come from present or prior law, but comes, rather, from our own recent approval of behemoth consolidations. Mr. Fitzgerald further contends that the "enhanced competition" standard lacks a rational basis for future transactions, because (Mr. Fitzgerald explains) it extends beyond merely trying to address the curtailment of competition that might result from the transaction. And, Mr. Fitzgerald adds, to promote enhanced competition is to promote inequality among users of carrier services.

Employee matters. Mr. Fitzgerald contends that the right to participate in STB proceedings and to receive protection should not be subverted by twisting the terms "labor" and "employee."

(1) *Employee participation.* Mr. Fitzgerald notes that, whereas 49 U.S.C. 11324(b)(4) requires the STB to consider the interests of "rail carrier employees," NPR § 1180.1(m) encourages participation by "rail labor." Mr. Fitzgerald contends that, if our rules are to set forth specific categories of participants, the rules should track the statutory term "employee."

(2) *Employee protection.* Mr. Fitzgerald notes that, whereas 49 U.S.C. 11326 speaks of protective arrangements for "employees," NPR § 1180.1(e) would instead continue, in the caption, the term "labor protection." Mr. Fitzgerald urges that the term "employee protection" be substituted for "labor protection" in the NPR § 1180.1(e) caption. Mr. Fitzgerald explains that the term "employee" would be consistent with the statute, and also with the proposed text of NPR § 1180.1(e). Mr. Fitzgerald further explains: that the confusion between "employee" and "labor" appears to stem from efforts to deprive "management" personnel who may not be "officials" of their statutory right to employee protection; and that the terms "officials" and "employees" over the years have been the dividing lines for "employee protection" under the Interstate Commerce Act, contrary to any inference of "management vs. labor" that might characterize other statutes. And, Mr. Fitzgerald adds, the Board should not promote the disentitlement of so-called "management employees."

Other issues. (1) *NPR § 1180.3(a).* Mr. Fitzgerald opposes the proposed definition of "applicant" because (Mr. Fitzgerald explains) the revision would exclude subsidiaries of an applicant if such entities are noncarriers. Mr. Fitzgerald insists that full disclosure of a rail carrier's noncarrier family members remains justified. (2) *NPR § 1180.3(b).* Mr. Fitzgerald opposes the proposed definition of "applicant carriers" because (Mr. Fitzgerald insists) full disclosure of all related carriers is required. And, Mr. Fitzgerald adds, the requirement for including carriers should be clarified to mean all carriers, whether or not regulated by the STB, and irrespective of mode. (3) *NPR § 1180.4(c)(6)(vi).* Mr. Fitzgerald opposes the proposed revision that (Mr. Fitzgerald explains) would allow an applicant to submit consolidated data for itself and all affiliated applicant carriers, in one package. Mr. Fitzgerald contends that this revision, along with other revisions and the policy statement, serve to promote secrecy. And,

Mr. Fitzgerald adds, rail employees have a special interest in having data segregated by carrier. (4) *NPR § 1180.6(b)(6).* Mr. Fitzgerald opposes the proposed revision that (Mr. Fitzgerald explains) would eliminate the present requirement that all common officers and directors be listed, and substitute a listing requirement for only those officers and directors of a different corporate "family." Mr. Fitzgerald argues that this proposal is yet another of the added secrecy features in the STB process. (5) *NPR § 1180.6(b)(8).* Mr. Fitzgerald opposes the proposed revision that (Mr. Fitzgerald explains) would limit required disclosure of intercorporate or financial relationships to those exceeding 5% of a non-affiliated carrier. Mr. Fitzgerald insists that full disclosure, not greater secrecy, should be the rule. (6) *NPR § 1180.6(b)(10), (11); NPR § 1180.7.* Mr. Fitzgerald opposes the "enhanced competition" aspects of these proposals.

APPENDIX F-1: SUPPLEMENTAL SUBMISSION REGARDING LABOR

Joint Supplemental Submission by Certain Carriers and Labor Organizations. (1) In the NPR, the Board urged rail labor and rail management to enter into agreements resolving merger implementation issues. The Board said, in particular, that the language of NPR § 1180.1(e) "reflects our continued emphasis on negotiation, without direct Board involvement, between the unions and railroad management to resolve merger implementation issues. A recent agreement between the United Transportation Union and the major railroads governing their approach to implementing all major rail consolidation transactions, including the handling of existing collective bargaining agreements, indicates that such negotiations can be a win-win situation, with both sides gaining value through an agreement. The Board is aware of other efforts at the highest levels to arrive at similar agreements involving other crafts, and is quite interested in the resolution of those initiatives before issuing our final rail merger policy and rules. We continue to encourage such private-sector agreements, both on an overall basis and in the context of implementing agreements geared to a particular merger." NPR, slip op. at 17.

(2) On April 4, 2001, a joint supplemental submission (styled "Joint Supplemental Submission by Certain Carriers and Labor Organizations Regarding Labor Protection Issues") was filed on behalf of certain Class I railroads (The Burlington Northern and Santa Fe Railway Company, The Kansas City Southern Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Canadian Pacific Railway) and certain labor organizations (Brotherhood of Locomotive Engineers, Brotherhood of Railroad Signalmen, Sheet Metal Workers International Association, Carmen Division of Transportation Communications International Union, Brotherhood of Maintenance of Way Employes, International Association of Machinists, Transportation Communications International Union, and Transport Workers Union of America). The joint supplemental submission was submitted to the Board in order to keep the Board informed about the progress of negotiations over labor protection issues, and to report to the Board that the submitting parties have resolved the preemption issue to their mutual satisfaction.

(3) The joint supplemental submission indicates: that the submitting parties have reached an agreement[130] that resolves the preemption issue (the issue as to the modification of CBAs) to the satisfaction of the submitting parties; that, as of April 4, 2001, the railroad parties include all Class I railroads other than the Canadian National affiliates, and the labor parties include all the national rail labor organizations listed above; and that the 2 agreements that have now been

[130] A copy of the agreement (styled "Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act") is attached to the joint supplemental submission.

entered into on the preemption issue (the agreement now reached by the submitting parties and the agreement previously reached by the United Transportation Union and the carriers) cover approximately 93% of the represented employees of the railroad parties.

(4) The joint supplemental submission further indicates that, with one qualification, the agreement that the submitting parties have reached takes all proposals by the parties off the table with respect to agreement overrides and implementing agreement and selection and assignment of forces issues. The one qualification concerns employee relocation and severance pay issues. The joint supplemental submission indicates that, because the agreement provides that "[i]t is understood that this Agreement does not address proposals pending before the Surface Transportation Board regarding employee relocation and severance pay," the parties remain free to address issues regarding that limited subject matter as they see fit.

(5) The agreement that the submitting parties have reached also provides: that the procedures set forth in the agreement will be prescribed by statute and not as a condition imposed and administered by the Surface Transportation Board or any successor agency; that the terms of the agreement when enacted in statutory form will not be subject to the 49 U.S.C. 11321(a) exemption provision; that the parties will agree on appropriate statutory language to that effect; and that, until enactment of such statutory language, the railroad signatories will not assert such exemption authority. The agreement that the submitting parties have reached further provides that, prior to the adoption of the agreement by an Act of Congress, the signatory parties will jointly petition the Surface Transportation Board to enact a regulation providing that the award of an arbitrator under the agreement shall be treated as a final decision of the Board (which, the agreement advises, would make such award subject to review by the United States Court of Appeals for the District of Columbia Circuit under statutory provisions and standards applicable to review of agency adjudications).

(6) The joint supplemental submission also indicates that the agreed-upon joint petition to enact a regulation regarding review of arbitration awards will be submitted "in due course." The joint supplemental submission further indicates that the arbitration review matter requires no action by the Board in this rulemaking proceeding.